Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

COMMENTS OF T-MOBILE USA, INC.

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T-Mobile USA, Inc. ("T-Mobile") supports the goals in the Further Notice of Proposed Rulemaking ("FNPRM") to reform and modernize the Universal Service Fund ("USF") contribution mechanism[1]

INTRODUCTION AND SUMMARY

While the Commission's initial contribution mechanism was better suited for the communications industry that existed in 1997[2]—one dominated by incumbent local exchange carriers ("ILECs") and interexchange carriers providing circuit switched wireline services—it is ill-suited for the industry as it exists today. The displacement of legacy wireline services by mobile wireless and voice over Internet Protocol ("VoIP") services has resulted in a USF contributions system that is no longer fair, efficient, or sustainable. The USF contribution base continues to shrink as customers adopt communications services that do not contribute to the fund. As the FNPRM notes, nearly three-fourths of USF contributions come from just five

[1] *Universal Service Contribution Methodology, A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357 (2012) ("FNPRM").

[2] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9171-9212 ¶¶ 772-857 (1997) ("*First USF Order*") (subsequent history omitted) (establishing the first USF contribution mechanism under Section 254 of the Communications Act of 1934).

companies, including T-Mobile. As wireless revenues have increased, the wireless industry has been required to bear an increasingly large and disproportionate share of the USF contribution burden—even as the Commission has adopted rules that reduce the share of USF support that wireless carriers will receive to expand service to rural and high-cost areas across the country. And, at the same time, the Commission has adopted policies increasing ILEC support. Wireless carriers should not be asked to fund their wireline competitors in this way—especially given consumers' overwhelming preference for mobile services. The Commission should avoid these sorts of market distortions by treating substitutable services the same. It should broaden the base of contributors to the greatest extent possible in order to reduce the contribution factor and reduce administrative burdens created by arbitrary line drawing between intrastate and interstate revenues and substitutable services. Only then will it achieve competitive neutrality and make the system "future proof" in order to ensure long-term USF sustainability.

DISCUSSION

I. CONTRIBUTION REFORM SHOULD PROMOTE EFFICIENCY, FAIRNESS, AND SUSTAINABILITY

The Commission correctly points out that the current USF contribution system is plagued with uncertainty and competitive distortions.[3] When it developed the existing contribution methodology in 1997, the Commission attempted to follow the principle of competitive neutrality and establish rules that would not unfairly favor one provider over another or one

[3] FNPRM, 27 FCC Rcd at 5374 ¶ 28.

technology over another.[4] The Commission tried to ensure that competitors had roughly similar contribution obligations[5] and that contribution rules were easy to comply with and administer.[6]

The transformation of the communications industry since the Commission created the original contribution mechanism, however, has complicated application of the contribution methodology and reduced the revenue base on which contributions are assessed.[7] This transformation also has altered the balance of services and technologies that make up the revenue base, from a dependence on traditional wireline services for the vast majority of the revenue in the contribution base to a mix reflecting the tremendous growth in mobile wireless and the advent of VoIP service.[8] These changes, particularly the changing make-up of the revenue base, has unmoored the contribution methodology from its founding principles of competitive and technological neutrality.

Specifically, the growing wireless sector increasingly supports the declining wireline sector. Currently, wireless carriers contribute approximately three billion dollars annually to the USF[9] but receive less than half that amount in high-cost funding.[10] This scenario will only

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[4] *Id.* at 5361 ¶ 8 (quoting *First USF Order*, 12 FCC Rcd at 8801 ¶ 47).

[5] *Id.* at 5361-62 ¶ 8.

[6] *Id.*

[7] *Id.* at 5368-72 ¶¶ 18-21.

[8] *Id.* at 5368-72 ¶¶ 18, 20-21.

[9] *See* Comments of T-Mobile USA, Inc., WC Docket No. 10-90, at 20, 23 (dated Aug. 24, 2011).

[10] Wireless competitive eligible telecommunications carrier ("CETC") funding, which was capped in 2008, *see High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008), *aff'd sub nom. Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009), totaled $1.2 billion in 2010. *See Connect America Fund*, Report and Order and Further Notice of Proposed

worsen as that high-cost funding is phased down to zero by 2016 pursuant to the Transformation Order[11] and replaced by Mobility Fund Phase II support for wireless carriers' that will be a mere one-sixth of the current contributions.[12] By contrast, ILECs received just under three billion dollars in high-cost support in 2011,[13] but will see their support increase to 3.8 billion dollars under the Transformation Order.[14] This is the case even though ILECs' USF contributions continue to decline as customers leave them for mobile and VoIP services.[15] Thus, in four years, mobile wireless carriers will receive a *total* of only 500 million dollars while still paying out three billion dollars *annually* if the contribution mechanism is not meaningfully reformed.

T-Mobile agrees with the Commission's conclusion in the Transformation Order that the central objectives of reform should be to "simplify compliance and administration, maintain competitive neutrality, and ensure long term sustainability of the Fund . . . ."[16] As the Commission explains, these objectives underscore the need to achieve efficiency, fairness, and sustainability in any contribution reform effort.[17] Fairness is an especially relevant concern here

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Rulemaking, 26 FCC Rcd 17663, 17826-27 ¶ 501 & n.831 (2011) ("Transformation Order"), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[11] Transformation Order, 26 FCC Rcd at 17832 ¶ 519.

[12] *See id*. at 17825 ¶ 495 (Mobility Fund Phase II support will ultimately total $500 million annually).

[13] *See* Universal Service Monitoring Report, Dec. 2011, CC Docket No. 98-202, Table 2.11, *available at* http://transition.fcc.gov/wcb/iatd/stats.html (click on "Federal-State Joint Board Monitoring Reports") (last visited July 6, 2012).

[14] *See* Transformation Order, 26 FCC Rcd at 17711 ¶ 126.

[15] *See* FNPRM, 27 FCC Rcd at 5371-72 ¶ 20, Chart 2.

[16] *Id.* at 5372 ¶ 22.

[17] *Id.* at 5372-74 ¶¶ 22-27.

because different treatment for substitutable services creates unintended market distortions that harm competition and consumers.[18] The increasing share of the USF contribution burden borne by mobile wireless carriers, juxtaposed with the reduced share of high-cost support received by those carriers and the increased support received by ILECs, thwarts USF goals, distorts competition, and is unfair to consumers. Under the existing system wireless carriers effectively are asked to fund their wireline competitors—despite consumers' overwhelming demonstrated preference for mobile wireless services.

The existing contribution mechanism should be reformed for greater administrative efficiency. Contributors such as T-Mobile waste significant resources attempting to track and apportion revenues among various reporting categories (interstate, telecommunications service, end user). This issue is of concern to every segment of the industry, as reflected in the Commission's recitation of the categorization, apportionment, and reporting chores required to meet carriers' contribution obligations.[19] The revised methodology should eliminate these obsolete categories.

II. THE COMMISSION SHOULD CONSIDER A RANGE OF CONTRIBUTION MECHANISMS

T-Mobile previously supported Commission proposals to assess contributions on a numbers and/or connections basis with modifications.[20] Nevertheless, in light of the new proposals and evidence presented in the FNPRM, T-Mobile is open to considering different

[18] *Id.* at 5373 ¶ 24.

[19] *See id*. at 5363-65 ¶¶ 10-12, 5367 ¶¶ 14-15.

[20] *See, e.g.,* Comments of T-Mobile USA, Inc., WC Docket No. 05-337, at 15-17 (dated Nov. 26, 2008); Letter from Thomas J. Sugrue, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (dated Apr. 4, 2006).

contribution methodologies, including a revamped revenue-based approach. While a numbers- or connections-based contributions mechanism would alleviate the need to allocate revenues among various categories (*e.g.*, jurisdictional and assessable/non-assessable), there are potential disadvantages to using these types of mechanisms. First, numbers are becoming less relevant as networks transition to IP. Also, fairness concerns arise if low-usage and high-usage numbers are required to contribute the same amount. Similar concerns arise with a connections-based approach, which would need to distinguish between different capacity tiers so that a low use prepaid wireless phone, for example, is not contributing the same amount as a high-capacity T-1 line into an office building.

Consistent with the above principles and goals, a fresh approach that involves broadening the contribution base to cover all communications and information services that include a transmission component, whether interstate, intrastate, or international (combined with a value-added calculation to avoid double-assessment) deserves serious consideration.[21] This approach, which is similar to the general definitional approach proposed by the Commission, would enhance administrative efficiency because it would avoid the need for classifying services and determining whether traffic is inter- or intrastate, both of which are becoming increasingly difficult as the broad adoption of differing technologies, e.g., VoIP, obscures such distinctions. Avoiding classification of the continuous introduction of new services also would make such an approach more "future proof" and produce a more sustainable contribution system.[22]

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[21] *See, e.g.,* FNPRM, 27 FCC Rcd at 5392-98 ¶¶ 74-94 (proposing that any interstate service be assessable if it also includes the transmission to end users). Regarding the value-added approach, *see* Section III, *infra*.

[22] *See* FNPRM, 27 FCC Rcd at 5392-93 ¶ 74.

Once the universe of assessable services is determined, a bright-line rule for apportioning revenues from bundled offerings that include products and services that are not assessable might be worth consideration. Many customized bundled packages offered to the enterprise market include IT support, data centers, equipment and other products not subject to contribution obligations.

Similarly, T-Mobile would be open to considering reform proposals that would potentially assess all revenues from assessable services, eliminating the wasteful effort to allocate revenues among the interstate, international, and intrastate jurisdictions.[23] T-Mobile agrees that the communications marketplace has changed significantly since the TOPUC decision, which found that the Commission did not have jurisdiction to assess federal universal service contributions on intrastate revenues. In particular, bundling of interstate and intrastate services has become the norm, and devices and consumers have become increasingly mobile. Therefore, the Commission's authority to assess intrastate revenues could be reconsidered.[24]

T-Mobile's willingness to consider a reform proposal that would take a broad-based approach to defining the services in the contribution base is contingent on the inclusion in the base of all communications and information service revenues with a transmission component to ensure competitive neutrality. If, however, the Commission ultimately adopts such an approach with various categories of communications or information service revenues excluded, fairness would require that text messaging revenues also be excluded. Text messaging, which is a subset

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[23] *Id.* at 5408 ¶¶ 129-31.

[24] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) ("TOPUC"). *See also* FNPRM, 27 FCC Rcd at 5405 ¶ 122.

of mobile data services,[25] shares many of the characteristics of voice telephony, electronic mail, and other messaging applications offered by a wide range of providers and is increasingly a substitute for these services.[26] If other categories of services are carved out of an otherwise broad definition of assessable services, competitive and technological neutrality require that text messaging also be excluded to avoid increasing the already disproportionate contribution burden borne by the mobile wireless industry.

III. A VALUE-ADDED SYSTEM SHOULD BE EXAMINED AS PART OF THE COMMISSION'S REFORM EFFORT

As the Commission notes, the current process for identifying wholesale revenues for contribution purposes presents compliance and other administrative complexities and inefficiencies.[27] The complex wholesale/resale distribution relationships and other value chains in the communications marketplace lead to inadvertent double-assessment of reseller revenue or non-assessment of end user revenue that slips through the cracks, resulting in compliance disputes. The existing wholesale exclusion and reseller certification system has become highly problematic.

A value-added approach, as discussed in the FNPRM, shows potential promise as a more feasible solution to avoid the risks of double-assessment or non-assessment.[28] T-Mobile's parent company, Deutsche Telekom, operates under Europe's mostly value-added tax system, which creates strong incentives for accurate reporting of taxpayer status and amounts. Adoption of

[25] *See* FNPRM, 27 FCC Rcd at 5385 ¶ 54 n.159.

[26] *See id.* at 5384-86 ¶¶ 50-54.

[27] *See id.* at 5413-14 ¶ 148.

[28] *Id.* at 5414-16 ¶¶ 149-157.

such a system would help avoid the need to distinguish between end-user and wholesale revenues, instead requiring each provider to contribute based on its assessable service revenues minus purchases of assessable services. This value-added approach also could potentially meet the proposed goals of improving administrative efficiency, while maintaining sustainability of the fund. Additional study about how to implement such a system would be required before any decision could be made, and any new value-added rule would have to be implemented so as to allow carriers to update contracts keyed to the current contribution system.[29]

IV. INTERIM CHANGES CAN IMPROVE THE CONTRIBUTION SYSTEM IN THE NEAR TERM

A. The Commission Should Seek Comment for Any Proposed Revisions to the Reporting Form and Instructions Prior to Implementation

T-Mobile strongly supports the proposal to require the Wireline Competition Bureau to release any proposed changes to the Form 499 USF reporting form or instructions for comment prior to implementation.[30] The form and its instructions often effect substantive changes to reporting, and contributing obligations, materially affecting filers' contribution obligations. Under the Administirative Procedure Act, these changes should not be made without notice and comment.[31] The Commission has successfully implemented a similar process for collecting and considering comments before publishing the E-Rate eligible services list.[32] Because contributors

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[29] *Id.* at 5426 ¶¶ 156-57.

[30] *Id*. at 5478-79 ¶ 346.

[31] *See generally* 5 U.S.C. §§ 551-553.

[32] *See, e.g., Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program*, Public Notice, 26 FCC Red 8714 (WCB 2011); *Schools and Libraries Universal Service Support Mechanism*, Order, 26 FCC Rcd 13280 (WCB 2011) (adopting 2012 Eligible Services List).

have the most experience operating under the USF form and its accompanying instructions, they will have valuable insights about the implications of potential changes and can significantly improve the process. Furthermore, because Form 499 and instructions have such a significant impact on contributors' obligations, including record-keeping and pass-through requirements, the reporting requirements should be clear at the beginning of the reporting year, so that contributors understand their obligations throughout the reporting period.[33] It does little good to clarify a reporting requirement after a reporting year is already over.

The Commission also should clarify that any changes to the instructions apply only on a prospective basis. On more than one occasion, USAC has attempted to apply requirements that were added to the form instructions in audits of periods prior to the year that the relevant requirements were added to the form.[34] A simple rule clarifying that form instruction changes are not retroactive should prevent these cases and avoid applications for review. In addition, the Commission should clarify that carriers that rely on form instructions in good faith are protected against Commission action to the extent the Commission takes a contrary position on an issue in the future.

If, as suggested above, form instruction changes were subject to prior notice and comment, available before the reporting period ends, and if changes clearly could not be applied

[33] FNPRM, 27 FCC Rcd at 5479 ¶ 347.

[34] *See, e.g., Universal Service Contribution Methodology; Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, Order, 25 FCC Rcd 14533, 14540 ¶ 16 (WCB 2010) ("We agree with NetworkIP, however, that USAC erred to the extent it concluded that NetworkIP's reseller certificates for the audit years at issue were invalid solely because they were more than a year old. The filings at issue were made prior to 2007, and at that time, the relevant FCC Form 499 instructions did not expressly require new certifications every year.") (citations omitted).

retroactively, T-Mobile would not object to a rule requiring contributors to comply with the form and instructions.[35]

B. The Bureau Should Adjust the Contribution Factor Annually

As the FNPRM observes, the USF contribution factor has been subject to significant fluctuations from quarter to quarter.[36] Each change requires carriers to adjust their USF pass-through charges, which creates an administrative burden and, more importantly, affects consumers. A fluctuating contribution factor can make it difficult for consumers to budget, even over the relatively short term. By contrast, a more stable USF contribution factor from quarter to quarter would reduce consumer frustration and administrative burdens. For this reason, T-Mobile supports moving from the current quarterly contribution factor to an annual contribution factor.[37] The Commission already uses an annual factor for the Telecommunications Relay Service. Historically, quarter-to-quarter variations in the factor have tended to average out, and after so many years the Commission and USAC have sufficient experience and information to predict funding needs over a longer period of time. The Commission's recent actions to put most significant aspects of the USF program on firm budgets also will help USAC's budgeting process. The Commission's rules should be modified to provide that the contribution factor should be changed on an annual basis.

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[35] FNPRM, 27 FCC Rcd at 5479 ¶ 348.

[36] *Id.* at 5479-80 ¶¶ 351-52.

[37] *Id.* at 5480 ¶ 353.

C. The Commission Should Not Ban USF Line Items

While T-Mobile does not object to the current reasonable rules governing USF surcharges, T-Mobile opposes a new rule banning USF line items outright.[38] It is important – particularly in a competitive marketplace – for customers to understand the cost of universal service. Whether customers pay for universal service costs through explicit line items or simply through higher bills, they ultimately pay for the cost of the fund. If contributors are required to hide that cost from consumers, it will reduce or eliminate much of the discipline on the size of the fund. In addition, as the FNPRM notes, there are significant legal questions about the Commission's authority to prohibit USF pass-through charges.[39]

D. The Commission Should Improve the Contributor Audit and Appeals Process

As the FNPRM points out, "[n]o system is fair when some telecommunications providers play by the rules and others do not."[40] The Commission can significantly improve all contributors' ability to play by the rules by providing a streamlined and reliable way for parties to obtain guidance on contribution requirements and timely resolving appeals of contributor audits. It is not uncommon for contributors to encounter situations where the correct application of the rules is at best unclear. The Commission currently provides no easy way for contributors to obtain reliable advice in such situations.[41]

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[38] *Id.* at 5490-91 ¶ 394.

[39] *Id.* at 5491 ¶¶ 396-97.

[40] *Id*. at 5484 ¶ 368.

[41] Contributors can seek informal advice of staff, but such advice may not be reliable. And petitions for declaratory ruling are rarely resolved in sufficient time to meet filing deadlines.

The Commission might do well to follow the Internal Revenue Service practice, which is to provide private letter rulings to taxpayers that apply the tax code to the taxpayer's specific facts.[42] USF contributors and the contribution system as a whole would benefit if a similar situation were available in the USF contribution rules. While T-Mobile expects the revised contribution regime to be simpler and more straightforward than the current regime, there are bound to be difficult sets of facts and issues of first impression. Contributors should not be put in the position of making their best guess and risking the consequences if they guess wrong.

For the same reason, the Commission should establish new procedures to ensure that appeals of USAC contributor audits are resolved in a timely fashion.[43] Resolving contributor audits not only provides a definitive answer to the affected contributor, but also often provides clarity to other contributors facing similar questions. The Commission's rules require the Wireline Competition Bureau to resolve appeals of USAC decisions within 90 days,[44] but in practice these appeals invariable remain pending for many months and often years.[45] To ensure timely resolution of contributor appeals, the Commission should impose a reasonable deadline (such as six months) and provide that appeals pending after that time are resolved in favor of the contributor.

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[42] *See* "Understanding IRS Guidance – A Brief Primer," *available at* http://www.irs.gov/irs/article/0,,id=101102,00.html.

[43] *See* FNPRM, 27 FCC Rcd at 5484 ¶ 371.

[44] 47 C.F.R. § 54.724(a).

[45] *See, e.g., Request for Review by T-Mobile USA, Inc. of a Decision of the Universal Service Administrator*, WC Docket No. 03-109 (dated Feb. 16, 2010).

CONCLUSION

T-Mobile urges the Commission to reform the universal service contribution system consistent with these comments.

Respectfully submitted,

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